IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1637

THE CITY OF BURBANK, et al.,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE APPELLEES

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TABLE OF CONTENTS

CITATIONS

Cases

United States Constitution

Statutory Materials

Congressional Materials

Administrative Proceedings

Regulations and Orders

Secondary Material

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OPINIONS BELOW

The opinion of the court of appeals, reported in 457 F.2d at 667, is set forth at A. 410. The district court opinion, reported in 318 F. Supp. at 914, is reproduced at A. 341. The findings of fact and conclusions of law made by the district court are reproduced at A. 375.

QUESTIONS PRESENTED

1. Was the court of appeals correct in holding that the Burbank curfew ordinance is invalid under the Supremacy Clause because the city is purporting to exercise its police power in an area which has been preempted by the federal government?

2. Was the court of appeals correct in holding that the Burbank curfew ordinance is invalid under the Supremacy Clause because the ordinance is in conflict with an order of the Federal Aviation Administration applicable to nighttime flight operations at the Hollywood-Burbank Airport and with the federal statutory right of free transit through the navigable airspace?

3. Does the Burbank ordinance constitute an invalid attempt to regulate a phase of the national commerce which, because of its speed, volume, and complexity, must be regulated by a single authority?

4. Does the burden imposed on interstate commerce by enforcement of a local curfew render the Burbank ordinance invalid?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Art. VI, cl. 2 of the United States Constitution, reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

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* In addition to holding the Burbank ordinance invalid on the Supremacy Clause grounds, the district court also reached the Commerce Clause issues (questions 3 and 4) and answered each in the affirmative. The court of appeals did not find it necessary to go beyond the Supremacy Clause questions (A. 414).

and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Commerce Clause, Art. 1, sec. 8, cl. 3 of the United States Constitution, reads as follows:

"The Congress shall have Power . . .

". . .

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

The Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301, *et seq.*, is centrally involved in this appeal, as are the regulations thereunder, 14 C.F.R. Parts 71-77 and 91-97. Among the pertinent sections of that Act are the following:

Section 1508 of 49 U.S.C. provides, in part:

"The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . . ."

Section 1304 of 49 U.S.C. provides:

"There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

Section 1348 of 49 U.S.C. provides, in part:

"(a) The Administrator is authorized and directed to develop plans for and formulate policy with re-

spect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace . . . ."

". . .

"(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects."

Section 7 of the Noise Control Act of 1972, Pub. L. No. 92-574 (Oct. 27, 1972), which amends section 611 of the Federal Aviation Act, 49 U.S.C. § 1431 (providing for control and abatement of aircraft noise and sonic boom), is set forth in Appendix A to this brief.

Burbank ordinance No. 2216 (the "curfew ordinance"), held invalid below, added section 20-32.1 to the Burbank Municipal Code. It provides as follows:

"Sec. 20-32.1 Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This Section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

STATEMENT

1. Nature of the Case and Prior Proceedings.

This is an appeal under 28 U.S.C. § 1254(2) from a decision of the United States Court of Appeals for the Ninth Circuit entered on March 22, 1972, which unanimously affirmed a judgment of the United States District Court for the Central District of California. The judgment of the district court declared invalid an ordinance of the City of Burbank which purports to impose a night curfew on jet aircraft takeoffs at Hollywood-Burbank Airport. Appellants are the City of Burbank and various of its officials responsible for enforcement of the ordinance. Appellees are Lockheed Air Terminal, Inc., owner and operator of the Hollywood-Burbank Airport, Pacific Southwest Airlines, an intrastate carrier, and the Air Transport Association of America, an unincorporated trade association consisting of some thirty-two United States scheduled interstate air carriers.

On March 31, 1970, the City Council of Burbank passed the curfew ordinance prohibiting takeoffs of jet aircraft from the Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. Following the effective date of the ordinance, Lockheed Air Terminal, Inc., the airport owner, and Pacific Southwest Airlines filed this action in the United States District Court for the Central District of California seeking to have the ordinance declared unconstitutional and to enjoin its enforcement. The Air Transport Association of America was permitted to intervene as a plaintiff. The Federal Aviation Administration appeared *amicus curiae* in support of plaintiffs, and the State of California appeared in that capacity in support of defendants.

On September 24, 1970, after trial, the district court (Crary, J.) filed a memorandum opinion holding that the plaintiffs were entitled to declaratory and injunctive relief on both Supremacy Clause and Commerce Clause grounds (A. 341). On November 30, 1970, the district court signed and filed its findings of fact and conclusions of law (A. 375) and entered its judgment declaring the Burbank ordinance unconstitutional, illegal, and void, and enjoining its enforcement (A. 408).

Burbank sought review in the Ninth Circuit. Again, the Federal Aviation Administration and the State of California participated as *amici*. On March 22, 1972, the court (Browning, Duniway and Trask, J.J.) issued its opinion affirming the judgment of the district court (A. 410).

2. The Relevant Facts.

The district court's detailed Findings, of course, provide the authoritative context for this appeal (A. 375-

401).* Appellants' "Statement of the Case" largely ignores the findings and fails to deal adequately with the facts relevant to the issues presented by this appeal. The relevant findings and facts established by the record are summarized below:

(a) ***The Hollywood-Burbank Airport.*** The Airport was dedicated May 30, 1930, and has been in continuous use since that time by both private and commercial aircraft. There are two runways for the operation of aircraft at Hollywood-Burbank Airport, each of which can be used in either direction depending upon wind conditions. The Airport occupies approximately 535 acres, of which approximately 128 (including significant portions of each runway) are owned by the federal government. Although the major portion of the Airport lies within the City of Burbank, a portion of the Airport is within the City of Los Angeles. (F.F. 6, A. 377; F.F. 18, A. 380-81.)

Hollywood-Burbank Airport is an important "satellite" airport in the national air transportation system. Satellite airports, such as Hollywood-Burbank or Oakland International and San Jose Municipal in the San Francisco area, are airports that serve geographical areas immediately adjacent to major metropolitan areas which also have one or more "hub" or major airport facilities. These satellite airports play an essential role in the national air transportation system in relieving air and ground congestion, in reducing air-traffic delays at

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* The Burbank brief is replete with unproven and often irrelevant factual assertions, purportedly based upon such non-record sources as articles in newspapers and other periodicals, and statements by deeply engaged partisans during the congressional debates. *See, e.g.*, Br. pp. 22-32.

primary airport centers, and in providing more convenient service to the surrounding areas, which are of sufficient size in terms of population and economy to require their own air service. The important role of satellite airports is recognized by the Civil Aeronautics Board in its route investigations. (F.F. 11, A. 379; F.F. 13, A. 379.)

Hollywood-Burbank Airport forms a vital link in interstate and intrastate commerce. It is included in the National Airport Plan promulgated by the Administrator of the Federal Aviation Administration pursuant to the Federal Airport Act of 1946, ch. 251, 60 Stat. 170.* And it is the most convenient airport in the greater Los Angeles metropolitan area for the entire San Fernando Valley, Hollywood, and the cities of Burbank, Glendale, Pasadena and Alhambra, an area containing a population of 2.2 million persons. (F.F. 14, A. 379; F.F. 17, A. 380.) (The City of Burbank has a population of 95,000 (F.F. 7, A. 377).)

In 1969 there were approximately 32,000 air carrier movements at Hollywood-Burbank Airport serving 1,178,000 commercial passengers in regularly scheduled interstate and intrastate transportation. Approximately 97 percent of these operations were conducted by pure jet aircraft. (F.F. 20, A. 381; F.F. 6, A. 377.)

Hollywood-Burbank Airport has been an important commercial airport for Los Angeles for a number of years. Until 1946 all commercial flights into or from Los Angeles were conducted out of this airport. In that year Hollywood-Burbank counted 82,000 commercial

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* This Act was superseded by the Airport and Airway Development Act of 1970, which carries forward the requirement of a "national airport systems plan." 49 U.S.C. § 1712 (a).

movements serving 1,200,000 passengers. Military jets began operating from the Airport immediately following World War II.

Commercial service at Hollywood-Burbank declined in 1947 with the opening of what is now Los Angeles International, but by 1953 had rebounded to approximately 780,000 passengers annually. The advent of large commercial jet aircraft, which could not be accommodated at Hollywood-Burbank Airport, again caused a dip in the number of operations in 1959. But with the introduction of two and three-engine jet aircraft in 1965, the Airport experienced an upsurge in commercial operations which had continued to the time of trial. (A. 140-42, 159.)

The Burbank City Council has on several occasions requested and supported additional air transportation services at Hollywood-Burbank Airport in route proceedings before the Civil Aeronautics Board. The Mayor and City Council of Burbank expressly requested and supported the additional air service from Burbank to the Pacific Northwest, which route was awarded by the CAB on May 12, 1970 to Continental Air Lines. The CAB order required that this service be provided through the Los Angeles satellite airports, including Hollywood-Burbank Airport, rather than through Los Angeles International.* (F.F. 15-16, A. 380.)

* In authorizing this new route, the CAB stressed the importance of service rendered at satellite airports such as Hollywood-Burbank, stating in part: "The absence of such service, coupled with the ever-increasing dispersion of population, commerce and industry over vast areas in the two great metropolitan agglomerations [of Los Angeles and San Francisco], has resulted in many thousands of travelers being forced to undergo increasingly lengthy surface journeys over increasingly congested freeways to the international airports in order to commence their interstate journeys . . . ." PX 35, at pp. 6-7; Pacific Northwest-California Investigation, C.A.B. Docket No. 18884, CCH Av. L. Rep. ¶21,932 (May 12, 1970).

(b) ***The Curfew Ordinance.*** Following enactment, Burbank city officials publicly announced their intention to enforce the curfew ordinance (F.F. 9, A. 378). Immediately, the ordinance required PSA to cancel a regularly scheduled flight which it had operated for over two years serving an average of 125 passengers, 80 of whom were boarding at Hollywood-Burbank Airport (F.F. 61, A. 394). And although Continental Air Lines was granted new authority from the CAB to commence regularly scheduled interstate service from Hollywood-Burbank Airport to Portland and Seattle, the Burbank curfew ordinance would prevent Continental from filling out its service pattern by the addition of a southbound after-dinner flight (F.F. 65-66, A. 395).

(c) ***The Scope of Federal Regulation.*** The district court found that the federal statutes, regulations, and orders have completely occupied the field of the regulation of the use of navigable airspace and aircraft operations (F.F. 58, A. 393). The trial court's findings of fact reflecting the federal statutes and regulations governing air carrier operations are in Findings 23-27; those with respect to certification of aircraft, airmen and airports are in Findings 28-33; those with respect to the framework of federal centralized management and control of navigable airspace are in Findings 34-40; those covering federal control of all aspects of aircraft flight operations are in Findings 41-47; those relating to the exercise of centralized management and control directed to achieving the maximum efficient use of the navigable airspace, including flow control and high density traffic airport regulations, are in Findings 48-53; and those covering federal regulation of aircraft noise abatement are in Findings 54-57. Together, these Findings provide a comprehensive summary of the pervasiveness of federal regulation of all aspects of

aircraft operations, use of the navigable airspace and aircraft noise abatement generally and at Hollywood-Burbank Airport.

Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board, which authorizes and obligates the carrier to engage in air transportation and to provide adequate service with respect to persons, property and mail over specified routes. (F.F. 24, A. 382; C.L. 17, A. 404-05.) The Operations Specifications issued by the FAA to each carrier require these carriers to operate their turbojet aircraft within the navigable airspace in accordance with instrument flight rules (IFR) and specifically authorize the use of Hollywood-Burbank Airport (F.F. 27, A. 383).

Every portion of the flight of a commercial jet aircraft takes place under the direct control of an FAA facility, from the filing of a flight plan, through the assignment of a runway and clearance to taxi thereto, the takeoff clearance, the assignment of a standard instrument departure procedure (PX 7, A. 452-53) and a radio beam intersection to which to fly, to the assignment of a standard instrument approach procedure (PX 7) and clearance to approach for landing on an assigned runway. (F.F. 41-47, A. 386-89.)

(d) ***The Efficient Use of Airspace.*** In exercising centralized management and control over the navigable airspace of the United States, the FAA has as one of its statutory goals the efficient use of this airspace, which includes the expeditious movement of aircraft. A variety of techniques are used by the FAA to insure efficient use of the presently congested airspace, includ-

ing the utilization of centralized flow control procedures and high density airport rules which are discussed, respectively, in Findings 51-52 and 53-54 (A. 390-92). (F.F. 49-50, A. 390.)

As an aspect of effective airspace management, Lockheed is subject to federal regulation, as owner and proprietor of the Hollywood-Burbank Airport. The Federal Aviation Act of 1958 prohibits the establishment or construction of civil airports not receiving federal funds, such as Hollywood-Burbank, or even the substantial alteration of a runway layout, without prior compliance with regulations prescribed by the Administrator. 49 U.S.C. § 1350. This requirement was established "in order to assure conformity to plans and policies for, and allocation of, airspace by the Administrator . . . ." *Id.*

The FAA also directly regulates Lockheed, and all other airports serving air carriers certificated by the CAB, through the terms, conditions and limitations of the airport operating certificate issued by the Administrator (F.F. 33, A. 384). An airport cannot be operated without such a certificate. 49 U.S.C. §§ 1430 (a)(8), 1432. Prior to commencement of jet operations at Hollywood-Burbank Airport, the FAA determined under 49 U.S.C. §§ 1426, 1301(8), (22) that takeoffs and landings of jet aircraft on each runway would not be unsafe to persons and property on the ground or in the air (F.F. 19, A. 381). In addition, essential parts of the airport, including costly navigation aids and the Airport Traffic Control Tower and Radar Approach and Departure Control, are actually operated and maintained by the FAA itself pursuant to license agreement with Lockheed. (F.F. 36-37, A. 385; PX 5, 6, A. 440-52.)

(e) ***Noise Abatement Regulations.*** Actions taken by the FAA to achieve noise abatement at airports gener-

ally are summarized in Findings 54, 55 and 57 (A. 392-93). Such actions include regulations prescribing minimum altitude during descent for landing and climb rates after takeoff, as well as standard instrument departures to reduce noise over residential areas between 11:00 p.m. and 7:00 a.m.

Prior to the enactment of the Burbank curfew ordinance, the FAA took in hand the subject of nighttime takeoffs at Hollywood-Burbank Airport and acted to minimize the consequences of those operations by issuing the noise abatement order summarized in Finding 56 (A. 392). This order, which was issued by the FAA Chief of the Burbank Air Traffic Control Tower, establishes a preferential runway for departures of jet aircraft between the hours of 11:00 p.m. and 7:00 a.m. In issuing this order the responsible federal official announced his determination that the noise abatement procedures which it established were "designed to reduce community exposure to noise to the lowest practicable minimum" (PX 30, A. 454).

The trial court found that pursuant to this order, "the preferential runway is assigned by the FAA control tower [between 11:00 p.m. and 7:00 a.m.] by incorporation into an aircraft's departure 'clearance' as an instruction to the pilot" (F.F. 56, A. 393). Any person violating an air traffic control clearance or instruction is subject to a civil penalty and to suspension or revocation of his airman's certificate. 49 U.S.C. §§ 1429, 1430(a)(5), 1471; 14 C.F.R. § 91.75. The testimony showed that the preferential runway established by the order was used except for a "few occasions" when the control tower permitted deviation because of unusual weather or operating conditions affecting safety (A. 318, 322-23).

The FAA also employs its noise abatement authority in the field of aircraft design and performance. On November 18, 1969 regulations were adopted prescribing noise standards which must be met as a condition of type certification for new subsonic turbojet aircraft. 34 Fed. Reg. 18355, now published at 14 C.F.R. Part 36. Airplanes of older type design produced after July 1, 1973 would be required to comply with these "Part 36" noise standards under an FAA Notice of Proposed Rulemaking issued July 7, 1972. 37 Fed. Reg. 14814. And on October 30, 1970, the Administrator issued an Advance Notice of Proposed Rulemaking concerning "civil airplane noise reduction retrofit requirements." 35 Fed. Reg. 16980.

(f) ***Effect on Commerce.*** The district judge found that air commerce, by reason of its speed and volume, requires regulation by a single authority if it is to be conducted with maximum safety and so as to achieve efficient use of the navigable airspace (F.F. 59, A. 394; C.L. 21, A. 406). The evidence was uncontradicted that air transportation problems are not amenable to solution by local regulation (A. 368).

The district judge also found, upon the basis of uncontradicted testimony, that if the curfew ordinance were upheld, similar ordinances would be adopted by virtually all cities surrounding airports (F.F. 69, A. 396). Such a proliferation would adversely affect the aviation industry, the members of the traveling public, and the national economy (F.F. 70, A. 396).

The impact of such an ordinance on airline scheduling extends well beyond the period of any particular curfew and beyond the boundaries of the regulated airport. The Burbank ordinance alone restricts the period that Continental may originate departures from Seattle to twelve

hours of the day. (F.F. 66, A. 395.) And if curfews were adopted nationwide, departures between widely separated cities would be limited to less than one-third of the hours of the day (F.F. 68, A. 396).

The testimony showed that each day, some 1,009 scheduled domestic interstate departures occur throughout the United States between 11:00 p.m. and 7:00 a.m., and all these flights would have to be cancelled if a curfew were imposed on a nationwide basis (F.F. 74, A. 397). Continental Air Lines alone would have to cancel over 48 flights per day, and its operating costs would be increased by approximately 25 percent (F.F. 71-72, A. 397). Other carriers would be similarly affected (F.F. 73, A. 397).

Over 48 percent of the nation's air mail is carried during curfew hours. Nationwide imposition of a curfew would annually delay billions of pieces of mail at least one day in delivery. (F.F. 79, A. 399.) In addition, the air freight industry, which exists upon its ability to operate during curfew hours, would be required to cancel approximately 42 percent of the all-cargo services (F.F. 80-81, A. 399-400).

The testimony also showed that the imposition of curfew ordinances would cause a bunching of flights in the hours immediately preceding the curfew. This would have the twofold effect of increasing an already serious congestion problem and of actually increasing, not relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. The district court found that this "result is totally inconsistent with the objectives of the federal statutory and regulatory scheme." (F.F. 78, A. 399.)

Thus, based upon uncontradicted evidence, the district court found that the imposition of curfew ordinances on

a nationwide basis would (1) drastically restrict the hours available for flight scheduling far beyond the curfew period, (2) severely impair the efficiency of the aircraft maintenance system, (3) require extensive rescheduling at enormous inconvenience and expense, (4) deteriorate air transportation service to the public, (5) increase the already serious congestion problem, and (6) intensify the noise problem in the hours immediately preceding the curfew. (F.F. 67-68, 70-82, A. 396-400.)

3. Decision of the District Court.

The district court held that the federal government has preempted the field of regulations governing and controlling the use of airspace and air traffic. From its analysis of the federal statutes and regulations, the court concluded that "Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for its safe and most efficient use" (A. 361). The court also held that local curfew legislation "would conflict with the certificated rights and obligations" of the air carriers (A. 367-68).

The district court also ruled that the Burbank ordinance would violate the Commerce Clause in two respects. First, based upon its holding that the effect of the ordinance is to be considered on a "national basis," the court held that the ordinance cannot stand because there would be a "very serious loss of efficiency as to the use of air space" and the carriage of interstate passengers and goods would be "seriously interrupted" (A. 367). Second, the trial court held that "air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at maximum safety and efficient use of the navigable air space" (A. 368).

4. Decision of the Court of Appeals.

On March 22, 1972 the Ninth Circuit held the Burbank curfew ordinance invalid under the Supremacy Clause, finding it unnecessary to reach the Commerce Clause issues.

With respect to preemption, the court of appeals found that the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301-1542, created a comprehensive scheme to deal with air commerce at the federal level and that the overall design of Congress was to centralize in a single authority the power to promulgate rules and regulations for the use of the nation's airspace. The court found that Congress, in amending the Act in 1968, 49 U.S.C. § 1431, confirmed federal preemption of the field of aircraft noise regulation so as to exclude the exercise of State and local police power in this area. (A. 420-23.)

The Ninth Circuit also held that the Burbank curfew ordinance conflicted with the federal scheme of aviation regulation when tested by the standards of *Perez v. Campbell*, 402 U.S. 637 (1971), because it "interferes with the balance set by the FAA among the interests with which it is empowered to deal . . ." (A. 426). The circuit noted that at the time the Burbank ordinance was passed, the FAA had already issued and put into effect preferential runway use procedures with respect to night operations designed to reduce aircraft noise in the vicinity of the Hollywood-Burbank Airport to "the lowest practicable minimum." The court held that the attempt by the City of Burbank to go beyond the noise abatement measures adopted by the FAA "frustrates the full accomplishment of the goals of Congress." (A. 426-27.) In addition, the court ruled that the effect of the curfew was to terminate the federal statutory right of free transit through

the navigable airspace (A. 426 n.12). Judge Browning limited his concurrence to the conflict portion of the opinion.

SUMMARY OF ARGUMENT

Introduction

The context for the basic issue before the Court—whether a city can exercise its police power to impose a curfew on commercial jet flights—is the rapidly increasing dependence of our nation on its air transportation system. In the last two decades, the number of air passengers and the amount of air cargo and air mail have increased at a phenomenal rate.

Nighttime operations are crucial to the air transportation system, the record here indicating that 48% of the air mail and 42% of air cargo is carried during curfew hours. More than 1,000 scheduled flights would have to be cancelled every night if the Burbank curfew were applied nationally.

The unique nature of air commerce, together with our nation's dependence on it, is a theme which runs through all of the legal arguments. Aircraft travelling at 600 miles an hour constitute a way of travel which quickly escapes the bounds of local regulative competence. The testimony at the trial showed that the approach to problems of air transportation at the local level just does not work; it has to be done on a national basis because it is a national operation. Uncoordinated local attempts at regulation would produce confusion and chaos, and rather than solving the problem of aircraft noise would merely shift it to another community or another airport or another time period.

I. Preemption

The comprehensive Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.*, displays an unmistakable congressional intention to preempt the management of navigable airspace and regulation of aircraft flight operations. That Act, which establishes a public right of freedom of transit through the navigable airspace, directs the Federal Aviation Administrator to adopt regulations "to insure the safety of aircraft and the efficient utilization of such airspace." 49 U.S.C. §§ 1304, 1348(a). The authoritative Senate Report on the Act states that the Act was intended to vest "unquestionable authority for all aspects of airspace management in the Administrator of the new Agency [the FAA]."

The 1968 amendment to the Act, 49 U.S.C. § 1431, made explicit the FAA's responsibility with respect to the abatement of aircraft noise. It directed the Administrator to prescribe regulations "for the control and abatement of aircraft noise and sonic boom." This amendment carefully laid out the factors which the Administrator is to consider and balance in formulating noise abatement regulations. 49 U.S.C. § 1431(b), supplementing 49 U.S.C. § 1303.

The legislative history of the 1968 amendment states that it would "expand the federal government's role in a field already preempted" and that "state and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." S. Rep. No. 1353, 90th Cong., 2d Sess. 6-7 (1968). While the legislative history states that airport proprietors retain certain powers to exclude certain types of aircraft based upon noise considerations, this statement is not relevant here because the City of Burbank is not the proprietor of Hollywood-Burbank Airport.

The FAA has issued regulations of formidable proportions, impressive detail, and manifest sophistication. There are extensive regulations for noise abatement (including regulations covering the nighttime hours at Hollywood-Burbank Airport) as well as significant regulations for efficient use of the navigable airspace (including, for example, flow control procedures affecting aircraft on the ground at Hollywood-Burbank Airport).

The Noise Control Act of 1972, Pub. L. No. 92-574, constitutes a further assertion by the federal government of its dominance in the field of the abatement of aircraft noise. Under the terms of the new Act, the expertise of the Environmental Protection Agency (EPA) will bolster the broad regulatory power of the FAA under existing law. The new statute calls for a study by the EPA which will consider, among other things, "the imposition of curfews on noisy airports." 118 Cong. Rec. S 18644.

The federal regulatory scheme meets all three tests for preemption laid down in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and subsequent cases. First, viewed in sequence, the 1958 Act, the 1968 Amendment, and the 1972 Noise Control Act constitute a complete and pervasive occupation of the fields of airspace management and the regulation of aircraft operations and aircraft noise. Second, the congressional statutes and regulations pertaining to management of the navigable airspace unquestionably touch a field in which the federal interest is dominant. Finally, it is clear that uncoordinated local regulation would produce a result inconsistent with the objective of federal law, which is to secure efficient as well as safe use of the navigable airspace.

The Burbank curfew ordinance intrudes into this exclusive federal domain. It would deny jet aircraft access to the navigable airspace for fully one-third of each day.

As the district court concluded, the local imposition of curfews would cause a "very serious loss of efficiency" with the result that the statutory objective would be "compromised" (C.L. 16, A. 404). Moreover, curfews would increase the already serious congestion problem and also actually increase, not relieve, the noise problem by pushing more flights into the periods of greatest annoyance.

II. Conflict

Apart from the preemption issue, there is a "conflict" between the Burbank ordinance and an FAA order. At the time the ordinance was enacted, federal officials had already taken the subject of nighttime flights in hand: aircraft operations at Hollywood-Burbank Airport were already subject to an FAA noise reduction order (BUR 7100.5B) which established a preferential runway system for departures between 11:00 p.m. and 7:00 a.m. The Burbank ordinance would make a nullity of the FAA order and would, as the court of appeals unanimously held, conflict and interfere with the balance set by the FAA among the interests with which it is empowered to deal. In addition, the curfew would interfere with the federally guaranteed right of free transit through the navigable airspace. The Supremacy Clause bars a local enactment which would so frustrate the full accomplishment of the goals of Congress. *Perez v. Campbell*, 402 U.S. 637, 649 (1971).

III. Commerce Clause

Even in the absence of the comprehensive federal legislation present here, the Commerce Clause protects the

national commerce from hostile actions of local governments. One of the tests for the validity of a local law is whether it operates in an area where regulation should be prescribed by a single authority. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768-69 (1945). As the district court found, airspace management and the regulation of aircraft operation is such an area (F.F. 59, A. 394). The volume of air commerce, the speed with which it is conducted, and the technical complexity of aircraft scheduling, operations, and maintenance combine to establish a powerful need for centralized management.

The Burbank ordinance is also defective under the other test laid down in *Southern Pacific Co. v. Arizona*, namely whether the local regulation impedes substantially the flow of commerce. 325 U.S. at 768-69. Under this test, a local regulation should not be viewed as an isolated phenomenon but rather the Court should consider the effect on commerce if similar regulations were enacted throughout the United States.

There would be a "near catastrophic effect on the national air transportation system" if the Burbank curfew were applied on a national basis (F.F. 70, A. 396). For example, the air cargo industry exists upon its ability to operate during curfew hours, and the required cancellation of these all-cargo services would have a drastic impact upon the nation's business community (F.F. 80-81, A. 399-400). And billions of pieces of mail annually would be delayed at least one day in delivery (F.F. 79, A. 399). These massive disruptions in the national air transport system clearly constitute an unreasonable burden on interstate commerce and impede substantially its free flow.

ARGUMENT

Introduction.

The basic issue before the Court is whether a city can exercise its police power to impose a curfew on jet flights into the navigable airspace from an airport which the city does not own or operate and from which regularly scheduled commercial operations are conducted.

The nation's dependence on commercial air transportation has increased at a phenomenal rate in the last two decades. Passenger miles on certificated air carriers in the United States rose from 8,029 million miles in 1950, to 30,556 million miles in 1960, and to 104,155 million miles in 1970. Air cargo ton miles rose from 226 million in 1950, to 611 million in 1960, and to 2,295 million in 1970. Air mail ton miles in the United States grew from 47 million in 1950, to 136 million in 1960, and to 714 million in 1970.*

Nighttime operations are crucial to the air transportation system upon which the nation so heavily relies. The record here shows that 48% of the air mail** and 42% of air cargo is carried during curfew hours (F.F. 79-80, A. 399-400). If the Burbank curfew should spread to the entire system (and the district judge found that it would if upheld here, F.F. 69, A. 396), more than 1,000 flights would have to be cancelled every night (F.F. 74, A. 397-98). It was not hyperbole for the district court to find that a national curfew on the Burbank model would have

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* Civil Aeronautics Board Handbook of Airline Statistics, Tables 15, 27 and 40 (1971).

** The postal policy of the United States as established by the 1970 Postal Reorganization Act, 39 U.S.C. § 101, *et seq.*, provides that the achievement of "overnight transportation to the destination of important letter mail to all parts of the nation shall be a primary goal of postal operations." 39 U.S.C. § 101(f).

a "near catastrophic effect on the national air transportation system" (F.F. 70, A. 396).

The unique nature of air commerce, together with our nation's dependence on it, is a theme which runs through all of the legal arguments, as this Court early perceived, air commerce legally and literally "soared into a different realm than any that had gone before." *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 107 (1948). "A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past." *Id.* at 107.

The special character of air transportation pervaded the testimony at the trial. The testimony showed that during a single 24-hour period, a typical commercial aircraft, travelling at 600 m.p.h., will make stops in 10 different states and overfly perhaps another 10 states (A. 258). The former director of the United States Army Aviation, Clifton F. von Kann, testified that "aircraft have such a range and speed and they involve such technical complexity that they have to be managed on a centralized basis" (A. 258). James T. Pyle, former administrator of the Civil Aeronautics Administration, testified:

> "The approach to the solution of problems in air transportation at the local level just does not work. It has to be done on a national basis because it is a national operation." (A. 295.)

Given the nature of air commerce, "there would be utter chaos," testified Mr. Pyle, if there were a proliferation of ordinances enacted by intersecting and overlapping local jurisdictions, all addressing themselves to the same basic problem in air transportation (A. 296).

The major airports of the nation are so located that, if Burbank's ordinance were upheld, many of them would be subject to having their flight operations restricted by the police power of at least two and sometimes several local jurisdictions. And inevitably, uncoordinated local attempts at regulation do not solve the aircraft noise problem but merely shift it to another community or to another airport or another time period. (A. 292-93.)

In the pages which follow, we will show that Burbank's purported exercise of police power over air commerce is invalid because it invades a field which has been preempted by the federal government, because it conflicts with federal orders and statutes, and because it runs afoul of the Commerce Clause.

I. THE FEDERAL GOVERNMENT HAS PREEMPTED THE MANAGEMENT OF AIRSPACE AND THE REGULATION OF AIRCRAFT OPERATIONS AND AIRCRAFT NOISE.

In 1958 Congress enacted the comprehensive Federal Aviation Act, providing for the management of the navigable airspace and regulation of aircraft operations. The 1958 Act also contained a general provision which provided authority for the issuance of noise abatement regulations by the Federal Aviation Administration. 49 U.S.C. § 1348(c). In 1968 Congress enacted a specific section (now § 611) for "the control and abatement of aircraft noise and sonic boom." 49 U.S.C. § 1431(a). This specific federal authority for aircraft noise abatement was elaborated and confirmed by the Noise Control Act of 1972, Pub. L. No. 92-574 (Oct. 27, 1972).

In this section, we will first review these three crucial enactments and the pertinent regulations, and then discuss the legal effect of the pervasive statutory and regulatory scheme.

A. The Federal Aviation Act of 1958.

The cornerstone of the statutory scheme involved here is the Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.* (the "Act" or the "1958 Act"). The United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States," 49 U.S.C. § 1508(a). The Act also declares that "there is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States," 49 U.S.C. § 1304.

The Act authorizes and directs the Federal Aviation Administrator (the "Administrator"):

> "[T]o develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the *safety of aircraft and the efficient utilization of such airspace.*"* 49 U.S.C. § 1348(a).

The above-quoted section is the "heart" of the Act. S. Rep. No. 1811, 85th Cong., 2d Sess. 14-15 (1958) (hereafter " S. Rep. No. 1811"). This key section of the Act stresses the dual purpose of federal regulation of the use of navigable airspace:

(1) "to insure the safety of aircraft;" and

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* Unless otherwise noted, emphasis is added throughout.

(2) to insure "the efficient utilization of such airspace."

The legislative history of the Act illuminates the purpose of Congress to "vest in a single Administrator plenary authority for airspace management." S. Rep. No. 1811, at 15. The Senate Report pointed out that responsibility for air traffic control planning "has until quite recently been scattered among a plethora of interagency committees and boards instead of being concentrated in one overall authority." The Report indicated that "this situation has been made almost inevitable by the lack of any clear provision in present law for unified control of our national airspace." *Id.* at 13.

Previous efforts to achieve airspace allocation or unified control rested, said the Report, "upon the shifting sands of legal ambiguity." *Id.* at 14. The 1958 Act was intended to end the uncertainty:

> "The present legislation proposes to clear away this ambiguity once and for all by vesting unquestionable authority for all aspects of airspace management in the Administrator of the new Agency." S. Rep. No. 1811, at 14.

The comprehensive character of the 1958 Act itself leaves little doubt that Congress intended to provide the Administrator with the tools necessary to exercise his "plenary" authority. For example, the Administrator is authorized to develop plans and formulate policy with respect to the use of navigable airspace and allot the use of such airspace as he deems proper, 49 U.S.C. § 1348(a); prescribe rules governing the flight of aircraft, 49 U.S.C. § 1348(c); promote air commerce by establishing and maintaining air navigation facilities, 49 U.S.C. §§ 1303(d), 1348(b); prescribe certain types of equip-

ment airplanes must utilize, 49 U.S.C. § 1423(a)(1); issue airworthiness certificates to aircraft which are in a condition for safe operation, 49 U.S.C. § 1423(c); issue air carrier operating certificates specifying the federal airways over which each carrier is authorized to operate, 49 U.S.C. § 1424(b); and issue airman certificates specifying the capacities in which the holders are authorized to serve, 49 U.S.C. § 1422(a).

In exercising his powers, the Administrator is directed to consider the following factors as being in the "public interest":

> "(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;
>
> "(b) The promotion, encouragement, and development of civil aeronautics;
>
> "(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;
>
> "(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;
>
> "(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft." 49 U.S.C. § 1303.

Under section 1348(c) of 49 U.S.C., the Administrator is authorized and directed "to prescribe air traffic rules and regulations . . . for the protection of persons and property on the ground." Prior to the 1968 enactment of an explicit noise abatement section (§ 611), the Administrator prescribed FAA noise abatement pursuant to the authority and direction conferred by this section. *See,*

e.g., 25 Fed. Reg. 1764, 1767 (1960); 26 Fed. Reg. 9069, 9071 (1961).

Federal dominance in the fields of airspace management and air traffic control is not diminished by the "saving clause" in section 1506 of 49 U.S.C., which is relied upon by Burbank (Br. p. 35) and by the State as *amicus* (Br. p. 17). In "saving" the "remedies now existing at common law or by statute," this "boilerplate" provision preserves tort law remedies such as the right of individuals to commence wrongful death actions. *See, e.g., Fitzgerald v. Pan American World Airways, Inc.*, 229 F. 2d 499, 502 (2d Cir. 1956); *Porter v. Southeastern Aviation, Inc.*, 191 F. Supp. 42 (M.D. Tenn. 1961). But the preservation of these preexisting tort law remedies cannot be thought to provide any support for an ordinance such as Burbank's which infringes on an area where federal preemption is, as the court of appeals said in this connection, "unavoidable." (A. 424). Saving clauses of this type have long been held to preserve only those remedies not inconsistent with the purpose of the enactment. *See Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U.S. 121, 129-30 (1915); *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

B. The 1968 Noise Abatement Amendment.

In 1968, following hearings in both houses, Congress focused specific attention on the problem of aircraft noise. This effort resulted in the adoption of a new section of the Federal Aviation Act (§ 611) which directed the Administrator to prescribe rules and regulations for the control and abatement of aircraft noise and sonic boom, as follows:

> "In order to afford present and future relief and protection to the public from unnecessary aircraft

noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards, rules, and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter." 49 U.S.C. § 1431(a).

Supplementing 49 U.S.C. § 1303 (quoted above, p. 28), the 1968 amendment carefully laid out the additional factors to be considered by the Administrator in prescribing such noise abatement regulations:

"In prescribing and amending standards, rules, and regulations under this section, the Administrator shall —

"(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard, rule, or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard, rule, or regulation is economically reasonable,

technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

"(5) consider the extent to which such standard, rule, or regulation will contribute to carrying out the purposes of this section." 49 U.S.C. § 1431(b).

Thus, in formulating noise abatement regulations, the FAA is obligated under 49 U.S.C. §§ 1303 and 1431(b) to balance the need for environmental protection with considerations of safety, efficiency, common defense and available technology. As the court of appeals held, the statutory scheme vested in the FAA the responsibility to "resolve the proper balance among the multiple purposes" (A. 419).

The legislative history of the 1968 amendment supports the conclusion that the federal government has preempted the power of local government to deal with aircraft noise by controlling the flight of aircraft. The authoritative Report of the Senate Commerce Committee states:

"In this regard, we concur in the following views set forth by the Secretary [of Transportation] in his letter to the committee of June 22, 1968:

'The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. American Airlines v. Town of Hempstead, 272 F.Supp. 226 (U.S.D.C., E.D., N.Y. 1966). The court said, at 231, "The legislation operates in an area committed to Federal care, and noise limiting rules operating

> as do those of the ordinance must come from a Federal source." H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. *State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.'* " S. REP. No. 1353, 90th Cong., 2d Sess., July 1, 1968, 2 U.S. CODE CONG. & AD. NEWS 2693-94 (1968).

Burbank (Br. p. 48) purports to find comfort in the following portion of the Senate Committee Report relating to the powers of an airport "proprietor" (the entity owning and operating the airport):

> "However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." *Id.* at 2694.

In discussing the powers of the airport proprietor, the Committee Report states that "just as an airport owner is responsible for determining how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft." *Id.* at 2694. This language is drawn from *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962), where the Court held that the airport proprietor has to pay the bill if flights are found to constitute a "taking" of a landowner's property.

The difficulty with Burbank's argument based upon the 1968 Committee Report is that the appellant City of Burbank is not the proprietor of Hollywood-Burbank Airport. The proprietor of this airport is the appellee Lockheed Air Terminal. Accordingly, the court of appeals correctly rejected Burbank's argument:

> "The City of Burbank has no proprietorship interest in H-B Airport. It is making an effort to exert its police power in the field of noise regulation, which the Secretary states, and the Committee agrees, has been preempted by the Federal Government. The Supremacy Clause, U.S. Const. art. VI, cl. 2, invalidates that effort." (A. 423.)

Although not involved in this case, it should be noted that the ultimate scope of proprietary power is an unresolved issue involving difficult constitutional, statutory, and contractual issues. *See Opinion of the Justices,* ____ Mass. ____, 271 N.E.2d 354, 358-59 (1971). For example, under the Supremacy Clause, an airport operator would be barred from imposing a restriction on flight operations which would stand "as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell,* 402 U.S. 637 (1971). Airport restrictions on air commerce could also be vulnerable to attack under the Commerce Clause or under grant agreements between the proprietor and the federal government. But the proprietary powers, whatever they may be, are held by Lockheed, not by the City of Burbank.

C. The Scheme of Federal Regulation.

Pursuant to his broad statutory authority, the Administrator of the FAA has issued complex and detailed operational rules and regulations which control the flight of aircraft and govern the use of the navigable airspace

(14 C.F.R. Parts 71-77, 91-97). The highlights of these regulations, as applicable in this case, are described in Findings 34, 35 and 38-47 (A. 385-89). Reference to these regulations will confirm the correctness of the appraisal made by Judge Dooling in *American Airlines, Inc. v. Town of Hempstead*:

> "The powers granted by the Congress are not dormant but actively exercised. The regulations of the Administrator are of formidable proportions, impressive detail and manifest sophistication." 272 F. Supp. 226, 232 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

1. ***Regulations for Noise Abatement.*** The Administrator has promulgated extensive regulations to carry out his responsibilities in the field of noise abatement. *See* 14 C.F.R. § 91.87. These regulations have been promulgated under the 1958 Act's directive to prescribe air traffic regulations "for the protection of persons and property on the ground," 49 U.S.C. § 1348(c), and pursuant to the authority conferred by the 1968 amendment to "provide for the control and abatement of aircraft noise," 49 U.S.C. § 1431.

The noise abatement regulations of the Administrator embrace a wide range of flight techniques. For example, in the interest of alleviating noise disturbances to the residents of communities adjoining airports in metropolitan areas such at Hollywood-Burbank, the Administrator has established regulations that require jet aircraft to maintain an altitude of 1500 feet until further descent is required for a safe landing and, when taking off, to climb to 1500 feet as rapidly as practicable (F.F. 55, A. 392). The Administrator has also prescribed a variety of noise abatement runway use procedures to

avert aircraft from residential areas (A. 200-01, 308-09).* And where possible, the FAA has developed standard instrument departure procedures which are assigned between the hours of 11:00 p.m. and 7:00 a.m. in order to reduce noise over populated areas. Such standard departures are presently in effect at Los Angeles International Airport. (F.F. 57, A. 393.)

The FAA is also employing its noise abatement authority in the field of aircraft design and performance. On November 18, 1969, the Administrator adopted regulations prescribing noise standards which must be met as a condition to type certification for all new subsonic turbojet-powered aircraft. 34 Fed. Reg. 18355, now published at 14 C.F.R. Part 36. Under the "acoustical change" provision of these regulations, no currently certificated jet aircraft that exceeds the noise limits specified for new type designs may be modified to increase its noise over that of the parent airplane. On July 7, 1972, the Administrator issued a Notice of Proposed Rulemaking that would require airplanes of older type design produced after July 1, 1973 to comply with these Part 36 noise standards. In issuing this notice, the Administrator announced his determination that further aggravation of the aircraft noise problem involved in the continued production of older aircraft types "conflicts with the longstanding policy of the FAA" and "counteracts the acoustic benefit available from the introduction of new technology aircraft." The Administrator pronounced this situation "unacceptable from an environmental management standpoint." 37 Fed. Reg. 14814.

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* The specific noise abatement order applicable at Hollywood-Burbank Airport was described in the Statement at page 13, *supra*, and will be discussed in the "conflict" section of this brief at pages 65-67, *infra*.

2. *Regulation for Efficient Use of Navigable Airspace.* Especially pertinent to this case are the regulations adopted by the FAA in pursuit of the statutory goal of "efficient utilization" of airspace. 49 U.S.C. § 1348(a). The importance of this goal is heightened by the congestion of the navigable airspace in the vicinity of major air terminals, which at times results in FAA controllers "making use of all available airspace" in the Los Angeles area (A. 193). This condition exists in part because the services required by travelers and shippers frequently exceed the capacity of the nation's airport system (F.F. 48, A. 390). Congress recognized the emergence of this problem as early as 1958 when it referred to the national airspace as "a diminishing resource." S. Rep. No. 1811, at 13.

One set of regulations to insure efficient use of navigable airspace involves centralized "flow control" procedures. Flow control is a means of metering aircraft to meet any given traffic situation. By means of flow control restrictions, the FAA regulates the number of aircraft that will be accepted in an area and restricts altitudes or routes that may be flown for specified periods of time. Thus, an FAA Air Route Traffic Control Center receiving a flow control restriction becomes obligated to (a) clear aircraft on specified routes; (b) establish separation in time, altitude or distance; or (c) limit the number of departures in a given period by holding aircraft on the ground. This situation can and does result in the Los Angeles Center holding aircraft on the ground at Hollywood-Burbank Airport. (F.F. 48-52, A. 390-91.)

The FAA has also promulgated high density traffic airport rules which work in conjunction with flow control procedures to provide relief at certain major airport terminals in the United States. 14 C.F.R. § 93.121-.131.

The Administrator exercised his plenary authority in promulgating these rules to assure that the greatest number of persons would be efficiently transported during periods when IFR operations were in effect (R. 262). Pursuant to these rules, the hourly number of IFR operations (takeoffs and landings) is restricted to a specified number at certain airports designated by the FAA. These rules allocate varying numbers of IFR operations over the entire 24-hour period. (F.F. 53, A. 391.) And in allocating these IFR reservations, the Administrator specifically had in mind the noise disturbance that would result from encouraging the scheduling of more flights after 10:00 p.m. (F.F. 54, A. 392; A. 360.)

The validity of the high density traffic airport rules was challenged in *Aircraft Owners and Pilots Association v. Volpe,* Civil Action No. 927-69, United States District Court for the District of Columbia (unreported). (A transcript of the oral argument and of the court's decision appear at pages 208-68 of the Record on Appeal herein.) In that case District Judge Gesell upheld the high density regulation as a proper exercise of the "plenary authority" granted by the Act to the Administrator to insure "efficient utilization" of the airspace (R. 261-67).

D. The Noise Control Act of 1972.

On October 27, 1972, the President signed into law the Noise Control Act of 1972 ("1972 Act"), Pub. L. No. 92-574, 86 Stat. 1234. Aircraft noise is regulated by section 7 of the Act, which is set forth in Appendix A. As we shall show, this section constitutes a further assertion by the federal government of its dominance in the field of the abatement of aircraft noise.

1. ***The New Statute.*** Under section 7(a) of the 1972 Act, the Environmental Protection Agency ("EPA") is directed to conduct a comprehensive study of aircraft

noise problems, and report within nine months to the appropriate committees of Congress. This subsection provides:

> "The Administrator [of EPA], after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after the date of the enactment of this Act." [7(a).]

After completing its nine-month study, EPA is directed to submit to the FAA proposed regulations for the control and abatement of aircraft noise. This direction is contained in section 7(b) of the Act, which amends section 611 of the Federal Aviation Act and reads in part as follows:

> "Not earlier than the date of submission of the report required by section 7(a) of the Noise Control Act of 1972, EPA shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of *the FAA's regulatory authority over air commerce or transportation or over aircraft or airport opera-*

tions) as EPA determines is necessary to protect the public health and welfare. . . ." [§ 611(c)(1).]*

The italicized reference in the above quotation to "the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations" is a notable confirmation that prior federal authority in this field extends to regulation of "airport operations." It is a legislative affirmation of the court of appeals' statement:

> "Pursuant to 49 U.S.C. § 1431, the Administrator of the FAA, after consultation with the Secretary of Transportation, is to prescribe and amend such rules and regulations as he may find necessary to provide for the abatement of aircraft noise. Surely this does not mean abatement of noise of aircraft flying at or above 35,000 feet. That is not the kind of noise from which the public needs 'present and future relief and protection. . . .' The statute gives the Administrator power to deal with noise that is offensive to persons on the ground, including the noise created by low-flying aircraft, takeoffs and landings, *and the noise created by aircraft on the ground at airports.*" (A. 422.)

Under the new Act, the Administrator of the FAA retains final authority to prescribe or amend regulations for the control and abatement of aircraft noise [§ 611(b)]. And he is to issue such regulations after considering the recommendations of the EPA and in consultation with the Secretary of Transportation [§ 611(b), (c)(1)]. The regulations have as their statutory goal the protection of "the public health and welfare from aircraft noise and

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* The remainder of new subsection (c) of § 611 sets up an elaborate procedure for the FAA's consideration of the EPA proposals. Appendix A, at 2-4.

sonic boom" [§ 611(b)(1), (c)(1)]. In issuing or amending these regulations, the Administrator is to consider the same factors as previously set forth in 49 U.S.C. § 1431(b) quoted above at pp. 30-31 [§ 611(d)].

2. ***Legislative History of the 1972 Act.*** A review of the congressional debates and reports on the Noise Control Act of 1972 shows a reaffirmation of the dominant role of the federal government in the field of aircraft noise abatement. The debates revolved primarily around the respective roles of the FAA and EPA. During the initial debate in the House on H.R. 11021, Representative Rogers, House Floor Manager of the bill, urged that the FAA be given the final authority for setting aircraft noise standards, and the bill passed the House in accordance with his position:

> "The FAA should have final responsibility for setting aircraft noise standards because a comprehensive and detailed knowledge of aviation technology and flight operations is essential to setting achieveable standards. . . .
>
> "Final decision authority with respect to any standards affecting the aviation industry can realistically be vested only in an agency thoroughly knowledgeable of all possible impacts and consequences. The FAA is the only agency in Government which has such knowledge. The FAA is taking regulatory action as the state of the art will permit; its actions will be advised upon and oversighted by EPA. . . ." 118 Cong. Rec. H 1513 (daily ed. Feb. 29, 1972).*

In the Senate, the Public Works Committee reported out a bill (S. 3342) placing primary responsibility for

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* All citations to the Congressional Record are to the daily edition.

promulgation of aircraft noise standards on the Administrator of the EPA. During its work on this bill, the Senate committee had considered an action-forcing plan which would have required an airport operator to adopt and submit for EPA approval a plan to achieve certain noise levels around airports. [S. 3342, § 502(a), Comm. Print. No. 6, June 14, 1972, *reprinted in* 118 Cong. Rec. S 17759-60 (Oct. 12, 1972).] However, this provision was abandoned by the committee in favor of the four-point provision for study and recommendation by EPA, as ultimately contained in section 7(a) of the 1972 Act. S. Rep. No. 92-1160, 92d Cong., 2d Sess. 10 (1972) (hereafter "S. Rep. No. 92-1160"); remarks of Senator Tunney, 118 Cong. Rec. S 17753 (Oct. 12, 1972).

The importance of the EPA study and its intended role in an orderly national program were stressed by Senate Manager Tunney. He emphasized that the EPA study and recommendation "is not merely an extension of the investigations on this subject performed by EPA as required by title IV of the Clean Air Act Amendments of 1970," but "it is an effort to deal comprehensively with" program for an urgent problem. *Id.* at S 17753.

The Senate version went back to the House on October 13, and the Senate and House versions were blended together into the form in which the legislation was ultimately enacted, with final authority to prescribe and amend noise abatement regulations being retained by the FAA. 118 Cong. Rec. H 10287-300 (Oct. 18, 1972). On October 17, there was a colloquy between Representative Staggers, Chairman of the House Commerce Committee, and Representative Springer, ranking Republican on the committee, in which they both pointed to the "chaos" resulting from the local regulation which would ensue

in the absence of federal action. *Id.* at H 10239 (Oct. 17, 1972). In urging the House to accept the amended version, Representative Staggers, Chairman of the House Commerce Committee, gave the following rationale for the bill:

> "I cannot say what industry's intention may be, but I can say to the gentleman what my intention is in trying to get this bill passed. We have evidence that across America some cities and States are trying to do [sic] pass noise regulations. Certainly we do not want that to happen. It would harass industry and progress in America. That is the reason why I want to get this bill passed during this session."* 118 Cong. Rec. H 10294 (Oct. 18, 1972).

After the House approved the new version of H.R. 11021, Senator Tunney moved that the Senate concur. Making explicit the breadth of federal authority, he stated that the regulations to be considered by EPA, for recommendation to the FAA, would include:

> ". . . proposed means of reducing noise in airport environments through the application of emission controls on aircraft, the regulation of flight patterns and aircraft and airport operations, and *modifica-*

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* The context of Mr. Staggers' remarks is not entirely clear. He was engaged in a colloquy with Representative Hall who said he wanted "to be certain that the power of the FAA to regulate safety and noise-producing air transportation devices is maintained." 118 Cong. Rec. H 10294 (Oct. 18, 1972). Immediately following Mr. Staggers' remarks quoted above, Mr. Hall responded:

> "And of course since it is interstate commerce, it comes from the gentleman's committee and it involves more than interstate commerce in many instances, since it involves aviation compacts and large jet airports, and so forth." *Id.*

> *tions in the number, frequency, or scheduling of flights* [as well as] . . . *the imposition of curfews on noisy airports,* the imposition of flight path alterations in areas where noise was a problem, the imposition of noise emission standards on new and existing aircraft — with the expectation of a retrofit schedule to abate noise emissions from existing aircraft — *the imposition of controls to increase the load factor on commercial flights, or other reductions in the joint use of airports,* and such other procedures as may be determined useful and necessary to protect public health and welfare." 118 Cong. Rec. S 18644 (Oct. 18, 1972).

Senator Tunney's reference to the "imposition of curfews" leaves no doubt that this technique, like the other aspects of airspace management to which he referred, is within the scope of the federal scheme.

In his signing statement, the President explained his approval of the bill on the ground that "many of the most significant sources of noise move in interstate commerce and can be effectively regulated only at the federal level." 8 Weekly Comp. of Pres. Docs. 1582, 1583 (Oct. 28, 1972). The President's statement closely parallels the finding of Congress in section 2(a)(3) of the 1972 Act that "Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment."

3. ***Appellants' Views on the New Act.*** As indicated above, we believe that the Noise Control Act of 1972 strengthens the argument for federal preemption of the field involved here. Curiously, the views of the City of Burbank on the new Act seem diametrically opposed to those of the State of California as *amicus* in support of Burbank. Apparently referring to the rail and motor

carrier provisions, Burbank describes (Br. pp. 85-6) the Noise Control Act of 1972 as the "ultimate intrusion" into the state and local domain, and as part of an "insidious trend." Earlier in its brief (p. 22), Burbank states that the approach of Senate bill S. 3342 "held some promise of future relief," but failed to survive. And Burbank follows its discussion of the new Act by asking the Court to "reexamine the preemption and conflict doctrines as presently enunciated" (Br. pp. 85-86), thus demonstrating a plain though implicit recognition on Burbank's part that its curfew ordinance both conflicts with federal law and operates in an area preempted by the federal government.

On the other hand, the State of California in its supplemental *amicus* brief (pp. 4-16) purports to find support for Burbank's case in the legislative history because the bill ultimately enacted did not contain an express preemption provision which had appeared in the Senate bill. A closer look at this matter shows, however, that the history on this point in fact supports Lockheed's position.

The bill which initially passed the House on February 29, 1972 (H.R. 11021) was designed not to change the law with respect to federal preemption. The House Report accompanying H.R. 11021 [H.R. REP. No. 92-842, 92d Cong., 2d Sess. 10 (1972)] states:

> "No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill."

The Senate bill (S. 3342) which came from the Committee on Public Works contained the following provision as section 506:

"No State or political subdivision thereof may adopt or attempt to enforce any standard respecting noise emissions from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part."*

No similar provision was contained in the House bill.

Senate Report No. 92-1160 accompanying S. 3342 contained the following explanation of section 506:

> "States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." *Id.* at 10-11.

Senator Tunney, the Floor Manager of the bill, made a statement identical to the above quoted portion of the Senate Report in his remarks presenting the bill to the Senate. 118 Cong. Rec. S 17753 (Oct. 12, 1972).

On October 13, 1972, Senate Manager Tunney offered a perfecting amendment which modified section 506 to read as follows:

> "No State or political subdivision thereof may adopt or enforce any standard respecting noise emis-

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* Section 506 of the Senate bill was renumbered section 505 as the bill finally passed the Senate. 118 Cong. Rec. S 17989 (Oct. 13, 1972).

sions from any aircraft or engine thereof." 118 Cong. Rec. S 18013.

Senator Tunney gave the following explanation for the change:

> "Section 506 is clarified to preclude States and localities from enacting identical standards. This added pressure was thought essential in the absence of a tough and effective regulatory program. However, requirements of section 501 and enforcement provisions in the legislation give sufficient tools to accomplish a tough and coordinated enforcement program on the Federal level. There was no intention in the committee bill to alter the relative powers of the Federal Government, State and local government, and airport operator, over the control of aircraft noise. This amendment would also retain the same powers for all parties." 118 Cong. Rec. S 17989 (Oct. 13, 1972).

It appears that the Senate Floor Manager and the Senate believed that they had stated the existing law and preserved the status quo when they provided that "no state or political subdivision thereof may adopt or enforce any standard respecting noise emissions from any aircraft or engine thereof." No other meaning can be fairly given to Senator Tunney's statement that the Committee bill did not intend "to alter the relative powers of the Federal Government, State and local government, and airport operator," and that the perfecting amendment would "retain the same powers for all parties." 118 Cong. Rec. S 17989 (Oct. 13, 1972).

Considered in that perspective, the omission of the preemption provision in the melding together of the House and Senate bills into the final version of the Act

does not have the meaning attributed to it by the State of California.* Since the preemption provision of the Senate bill was regarded as codifying existing law, neither its inclusion nor its ultimate omission was meant to change the law. What is significant is that the Senate believed that the preemption clause stated the existing law — and more broadly, that Congress reaffirmed the intensive federal control in this field.

E. The Tests for Federal Preemption Are Fully Met.

1. ***Standards for Preemption.*** In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), this Court stated, in the disjunctive, the classic tests for determining whether federal legislation has preempted a given field:

> "[i] The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. [ii] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforce-

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* The State of California also asserts (Supp. Br. pp. 16-18) that the federal facilities compliance provision of the 1972 Act [§ 4(b)] requires federal agencies to comply with the Burbank curfew ordinance. Section 4(b) of the Act states that federal agencies "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements. . . ." The fallacy of California's argument is that it assumes the validity of the ordinance in question. Obviously, section 4(b) of the Act requires only that federal facilities comply with valid local requirements.

Equally fruitless is California's reliance (Supp. Br. pp. 16-17) on section 4(a) of the Act. Consistent with its authority under Federal laws, the FAA is required to balance concern for the environment with all the factors set forth in 49 U.S.C. §§ 1303 and 1431(b) in carrying out the programs under its control [§ 4(a)].

ment of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. [iii] Or the state policy may produce a result inconsistent with the objective of the federal statute." (Citations omitted.)

This Court has continued to apply and rely upon these three independent *Rice* tests in, for example, *Pennsylvania v. Nelson*, 350 U.S. 497, 502-09 (1956); *Campbell v. Hussey*, 368 U.S. 297, 302 (1961); and *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). There are of course situations such as those involved in *Head v. New Mexico Board*, 374 U.S. 424 (1963), and *California v. Zook*, 336 U.S. 725 (1949), cited by Burbank (Br. pp. 36-37), in which the tests for preemption have been held not to be satisfied. However, the standards prescribed by *Rice* certainly cannot be said to involve the "mechanical rules" which Burbank criticizes (Br. pp. 36-37). Indeed, the Court in *Rice* emphasized, as did the court below, the need for a careful scrutiny of the purpose of Congress and the scheme of federal regulation.

2. ***Fulfillment of the Tests.*** The federal regulatory scheme, summarized *supra* at pages 33-37, demonstrates a complete occupation of the fields of airspace management, and regulation of aircraft operations and aircraft noise. As both of the courts below held, each of the three tests for preemption laid down in the *Rice* case is independently met.

Applying the first *Rice* test, the district court found, and the court of appeals confirmed, that the federal scheme is so pervasive as to leave no room for localities such as Burbank to impose their own brand of regulation.

(F.F. 58, A. 393; C.L. 14, A. 404; A. 417.) The comprehensive federal authority contained in the Federal Aviation Act of 1958 was buttressed by the specific authority of the 1968 Aircraft Noise Abatement Amendment and, more recently, by the Noise Control Act of 1972. Taken together, the statutes indicate that Congress intended to confer "plenary" authority on the federal agencies to deal with airspace management, aircraft noise abatement, and aircraft operations.

Under the statutory directive to insure "the safety of aircraft and the efficient utilization" of the navigable airspace, 49 U.S.C. § 1348(a), and "to provide for the control and abatement of aircraft noise," 49 U.S.C. § 1431, the Administrator has promulgated regulations that are truly of "formidable proportions, impressive detail, and manifest sophistication" (C.L. 8, A. 403).

Noteworthy regulations in the field of airspace management are the high density traffic airport rules and the system of "flow control" (C.L. 9-10, A. 403). These regulations demonstrate that effective airspace management requires federal controls on the hours and times of operations at the nation's airports. The high density traffic airport rules affect airline scheduling by limiting, over the entire 24-hour period, the number of IFR operations at affected airports (F.F. 53, A. 391-92). And under the centralized flow control system, aircraft can be held on the ground at airports in order to reduce airborne delays and congestion (F. F. 51-52, A. 390-91).

Perhaps even more significant here are the FAA's aircraft noise abatement regulations, including (1) regulations regarding minimum altitudes and rate of climb, Finding 55, A. 392; (2) noise abatement runway orders, Finding 56, A. 392-93; (3) standard instrument depar-

tures to avoid residential areas, Finding 57, A. 393; (4) regulations regarding the noise characteristics of new aircraft and of modifications of existing aircraft, 14 C.F.R. Part 36; and (5) proposed rules to apply Part 36 noise standards to newly produced models of older type designs, 37 Fed. Reg. 14814. These regulations show a federal purpose to probe all feasible avenues to curb aircraft noise.

In sum, the federal statutes and regulations in the area of airspace management and aircraft noise abatement are so pervasive as to compel the conclusion that states and local governments may not superimpose on the federal scheme a limitation on the hours during which certificated air carriers may have access to the navigable airspace.

It is equally apparent that preemption has occurred within the meaning of the second *Rice* test, *i.e.*, the act of Congress "touches a field" in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. (C.L. 15, A. 404; A. 417.) National rather than local control of interstate surface transportation has long been the policy of Congress (*see City of Chicago v. Atchison, Topeka & Santa Fe Railway*, 357 U.S. 77, 87 (1958)). Even more clearly established is the longstanding national interest in control by the federal government over all aspects of air transportation.

The authoritative Senate Report which accompanied the Federal Aviation Act of 1958 states that in adopting this Act Congress recognized that "aviation is unique among transportation industries in its relation to the Federal Government — it is the only one whose operations are conducted almost wholly within the Federal

jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest. . . ." S. Rep. No. 1811, at 5.

The evidence adduced in this case demonstrates that air transportation calls for regulation of an even more penetrating, uniform, and exclusive nature than is necessary for any other mode of transportation (F.F. 59, A. 394; C.L. 15, A. 404). Briefly summarized, this evidence shows that the national air transportation system involves a degree of complexity unknown to other forms of transportation. Each element of the system — the airport complex, the air traffic control system, and the aircraft fleet — is dependent upon and interacts with the other components (A. 257-59). Aircraft scheduling, for example, involves the intricate meshing of inter-connecting flights with aircraft maintenance and crew problems (A. 230-31, 260-62, 264-65). And each day a single aircraft may operate into and from many airports in several states while overflying many other political jurisdictions (A. 258).

Finally, application of the third *Rice* test — whether the local regulation would produce a result inconsistent with the objective of the federal law — makes it equally clear that the Burbank curfew ordinance must fall before the extensive federal legislation and regulations. Fulfillment of this test, which is closely related to the conflict issue, is clearly seen when the Burbank curfew ordinance is considered in light of the federal noise abatement provisions. The ordinance would make a nullity of the FAA noise reduction order which established a preferential runway system for departures from Hollywood-Burbank between 11:00 p.m. and 7:00 a.m. The ordinance would

thus be inconsistent with the responsibility of the FAA to determine the balance between the competing interests.

Moreover, enforcement of the Burbank ordinance would be inconsistent with the FAA's duty to secure the "efficient" as well as the safe use of airspace. The district court concluded that local imposition of curfews would cause a "very serious loss of efficiency," with the result that the statutory objective would be "compromised" (C.L. 16, A. 404). The scheduling of commercial aircraft flights is an almost incredibly complex operation, requiring maximum flexibility and expert use of the available time and space. As the Findings indicate, denial of ingress into the navigable airspace for one-third of the available hours would constitute a severe hindrance to the operation of the national air transportation system (F.F. 70-82, A. 397-400). In addition, the imposition of curfews would have the inevitable effect of increasing congestion in the remaining hours available (F.F. 78, A. 399).

The inconsistency of a local curfew ordinance with the federal objective is confirmed by previous FAA action in rejecting proposed air traffic rules which would have placed a limitation on the use of an air carrier airport between 10:00 p.m. and 7:00 a.m. In refusing to impose such a restriction at Los Angeles International Airport, the Administrator stated the following reasons:

> "The practice of prohibiting the use of various airports during certain specific hours could create critically serious problems to all air transportation patterns. The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth

of public acceptance of aviation as a major force in passenger transportation and the increasingly significant role of commercial aviation in the nation's economy are accomplishments which cannot be inhibited if the best interest of the public is to be served. It was concluded therefore that the extent of relief from the noise problem which this provision might have achieved would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce." 25 Fed. Reg. 1764-65 (Mar. 1, 1960).

F. Prior Decisions Support the Holding of Federal Preemption.

Earlier decisions in this and related fields support the holding of federal preemption. We will discuss first the aviation precedents in the lower federal courts and state courts, and then turn to the decisions of this Court in related fields.

1. ***Lower Federal Decisions.*** Closely in point is *American Airlines, Inc. v. City of Audubon Park, Kentucky*, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir. 1969), *cert. denied*, 396 U.S. 845 (1969), where the court invalidated an ordinance making it unlawful to fly any aircraft over the corporate limits of the City of Audubon Park at a height of less than 750 feet. The court concluded that "the statutes enacted by the Congress clearly expressed an intent fully to preempt the field of law and regulation of interstate and foreign air traffic." 297 F. Supp. at 212. This holding was affirmed *per curiam* by the Sixth Circuit. 407 F.2d 1306 (1969).

Perhaps the most comprehensive discussion of the federal preemption issue prior to this case is contained in the district court's opinion in *American Airlines, Inc.*

v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), where the court held that the pattern of federal regulation invalidated the Town's ordinance seeking to regulate aircraft noise levels. The district court found that the ordinance operated to forbid noise only by forbidding flight, and, as such, operated in a preempted area. *Id.* at 230-31. The court said:

> "It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation. . . .
> ". . .
>
> "For present purposes it is enough to note that the FAA prepares and publishes approach procedures and standard instrument departures (SIDs) for Kennedy Airport which are provided to pilots and, taken with the elaborate flight manuals approved by the FAA and carried in each plane, *standardize every material element of a commercial airline take-off* or landing including flight path, glide slope on landing and, within limits, climb-out procedure. *Every such take-off* and landing *is a moving part in a vast complex of regional aircraft traffic control that involves transfer of aircraft from one FAA manned control center to another until the aircraft is safelanded on the runway or en route out of the area.* The weft of federal airways and electronic navigational aids mapped on the airmen's charts is a record of the elaborateness, complexity and immediacy of the federal provisions of aids to and controls of air traffic. . . .
>
> "The federal regulation of air navigation and air traffic is so complete that it leaves no room for such

local legislation as the Hempstead Ordinance. . . ." *Id.* at 232-33.

The FAA prepares and publishes approach and departure procedures for Hollywood-Burbank Airport, just as in the case of Kennedy Airport (F.F. 43, A. 387; F.F. 46, A. 389). These procedures, taken together with the FAA approved flight manuals, "standardize every material element of a commercial airline takeoff" at Hollywood-Burbank Airport (F.F. 41-47, A. 386-89). As in the *Hempstead* case, these elaborate and complex federal regulations leave no room for local attempts such as that of the City of Burbank to intrude on the federal domain of airspace management.

In the *Hempstead* case, the district court also found that the ordinance of the Town of Hempstead was in conflict with the federal action in the area. After citing direct conflicts between FAA landing and takeoff procedures and the requirements of the ordinance, the court stated:

> "The conflict, however, is also subtler. Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic." *Id.* at 235.

On appeal, the decision of the district court was affirmed on conflict grounds. 398 F.2d 369 (2d Cir. 1968). This Court denied *certiorari*. 393 U.S. 1017 (1969).

A very recent illustration of federal supremacy in this field is *United States v. City of New Haven*, 447 F.2d 972 (2d Cir. 1971), which involved a dispute between the Town of East Haven and the City of New Haven as airport operator over acquisition by New Haven of land for use as a "clear zone" at the end of an extended runway. The runway had been extended pursuant to federal grant agreements between the airport and the FAA to facilitate the use of jet aircraft. Although the runway extension was within the City of New Haven, the City purchased 73 acres in East Haven as the "clear zone." The Connecticut Supreme Court ruled that New Haven had not obtained the land in East Haven in accordance with Connecticut law. It ordered New Haven to cease operating the runway at its extended length and thereby using the "clear zone" it had improperly acquired.

The United States obtained a preliminary injunction in the federal district court restraining the enforcement of the state court order and directing that East Haven move the Connecticut court for dissolution of its order. The court of appeals upheld the federal court injunction on the basis of the supremacy of federal control over use of the navigable airspace. The court said:

> "Under the Federal Aviation Act of 1958 (49 U.S.C. § 1301 et seq. as amended) the United States has asserted that it possesses and exercises 'complete and exclusive national sovereignty in the airspace of the United States.' 49 U.S.C. § 1508(a). . . . State legislation purporting to deny access to navigable air space would therefore constitute a forbidden exertion of the power which the federal government as asserted." 447 F.2d at 973.

This result followed the pattern established in one of the earliest cases, *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955). There, the district court held that the comprehensive scheme of the 1938 Civil Aeronautics Act, the predecessor of the Federal Aviation Act of 1958, and the regulations adopted pursuant thereto, "have regulated air traffic in the navigable airspace in the interest of safety to such an extent as to constitute preemption in that field . . . ." 132 F. Supp. at 881. As a consequence, the court struck down an ordinance, enacted by a town adjacent to New York's Idlewild Field, prohibiting flights over the town at an altitude of less than 1000 feet. The court of appeals affirmed. 238 F.2d 812 (2d Cir. 1956).

Thus for some 17 years the district courts and courts of appeals have uniformly struck down local ordinances attempting to regulate aircraft operations or use of navigable airspace and, when asked, this Court has declined to review those decisions.

2. ***State Court Decisions.*** In the recent decision in *Opinion of the Justices*, ____ Mass. ____, 271 N.E. 2d 354 (1971), the highest court in Massachusetts held invalid proposed legislation which would prevent nonconforming supersonic airplanes from landing or taking off anywhere in Massachusetts if the noise they emitted exceeded a specified level. The justices found the proposed law, which was based upon police power and not proprietary power, invalid under the Supremacy Clause:

> "[T]he principles expressed in that [*Hempstead*] case and the comprehensive character of the Federal air statutes and regulations, existing even prior to 1968, lead us to conclude that the proposed Massa-

chusetts legislation would intrude upon an area preempted by the Congress." 271 N.E. 2d at 358.

The lower state court cases of *Stagg v. Municipal Court*, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969), and *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969), cited by Burbank (Br. p. 32) are inapposite.

Stagg involved a curfew regulation adopted by the proprietor of the Santa Monica Municipal Airport, which serves no scheduled commercial air traffic. Therefore, that case is not analogous to the attempt of Burbank to regulate with its police power an airport which it neither owns nor operates and where there are scheduled interstate and intrastate operations. Moreover, the *Stagg* decision was rendered without any consideration of the important 1968 Amendment to the Federal Aviation Act, 49 U.S.C. § 1431, the accompanying legislative history, or any of the recent noise control measures taken by the FAA.

The case of *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969) (cited by Burbank at Br. pp. 32, 60, 77), appears also to have been decided without considering the 1968 Amendment to the Act and the accompanying regulatory developments. In that case the trial court was asked to enjoin a planned expansion of a small, noncommercial airport and certain operational features of that airport. It did issue an "experimental" injunctive order requiring a jet curfew, after finding no preemption by the federal government, at least where no scheduled, certificated carriers were involved. 261 A.2d at 701. However, on July 17, 1972 the United States filed an action in the federal court in New Jersey to compel the dissolution of the state court-imposed cur-

few. *United States v. Town of Morristown*, Civil No. 1214-72, D.N.J.*

And of course both the *Stagg* and *Morristown* cases were decided before passage of the important Noise Control Act of 1972, Pub. L. No. 92-574 (Oct. 27, 1972), which reaffirmed the intensive federal control over aircraft noise abatement.

As it did in the court of appeals, Burbank has attempted to supplement the record in this case by appending and relying upon the FAA's response to the *Petition of Jordan A. Dreifus*. (Br. p. 41, *et seq.*; App. to Br. p. 4.) That petition, which was turned down by the FAA, requested the federal government to impose a night curfew at the Santa Monica Airport. The FAA's response in *Dreifus* relied heavily on the fact that the City of Santa Monica is the proprietor of the Santa Monica Airport, a circumstance to be contrasted with the fact that Burbank is not the proprietor of Hollywood-Burbank Airport. And it is Lockheed, not Burbank, that is regulated by the terms of the airport operating certificate issued by the Administrator of the FAA pursuant to 49 U.S.C. § 1432(a). Moreover, as indicated in the discussion of the *Stagg* case, Santa Monica is a general aviation airport with no scheduled operations, whereas Hollywood-

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* In Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, 39 Cal. Rptr. 708 (1964) (cited by Burbank at Br. pp. 35, 50), plaintiffs failed in their efforts to enjoin certain commercial jet flight operations. Although the court declined to find federal preemption of "all aspects" of air transportation (61 Cal. 2d at 591-92, 39 Cal. Rptr. at 614), the decision preceded the important 1968 amendment to the Federal Aviation Act, 49 U.S.C. § 1431, and the subsequent FAA noise control regulations. A similar request for injunctive relief was denied in Virginians for Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972), *appeal pending*.

Burbank Airport is a key satellite airport with scheduled interstate and intrastate operations serving more than one million passengers annually.

Most significant, however, are the comments of the FAA on *Dreifus* which are contained in the FAA's *amicus* brief in the court of appeals. After pointing out the distinctions discussed above between the Santa Monica and the Hollywood-Burbank situations, the FAA's brief states:

> "It is important to bear in mind that the *Dreifus* opinion stemmed from a request for Federal regulatory action of a type which the FAA considered as not being appropriate. (Appendix to Brief of Appellants at 12.) The FAA in the *Dreifus* opinion did not endorse the Santa Monica type curfew ordinance or intend by its action to encourage a multiplication of such restrictions on airport use by state and local governments, whether or not they acted as proprietors. . . . The FAA filed its brief *amicus curiae* in this case because it realizes that the proliferation of this type of local ordinance would stagnate and destroy the national air transportation system." FAA Brief in Court of Appeals at 25.

3. ***The Supreme Court Precedents.*** The decisions of this Court referred to by Burbank are not inconsistent with the decision below. The case of *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (cited by Burbank at Br. pp. 47-48), is distinguishable on the grounds stated by the Ninth Circuit:

> "There, Detroit was allowed to apply its Smoke Abatement Code to a vessel which had federally inspected and approved boilers. The Court found that the purpose of the federal inspection laws was

'clearly limited to affording protection from the perils of maritime navigation.' *Id.* at 445. On the other hand, the purpose of the city regulation was the control of air pollution for the health and welfare of its inhabitants. *Id.* at 442. Since these purposes were not conflicting and there was no overlap of scope between them, there was no preemption. . . ." (A. 419.)

In contrast to the situation in *Huron*, here, said the court of appeals, Congress has vested the FAA with the responsibility and authority to balance "considerations of safety, efficiency, technological progress, common defense and environmental protection in the process of formulating rules and regulations with respect to the use of the nation's airspace" (A. 419). This balancing process was demonstrated in the FAA's refusal to impose restrictions on the use of Los Angeles International Airport between 10 p.m. and 7 a.m. On that occasion the Administrator concluded that the extent of relief from the noise problem achieved by such a limitation "would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce." 25 Fed. Reg. 1765 (Mar. 1, 1960).

Moreover, the FAA's authority and responsibility to balance the safe and efficient use of the nation's airspace with environmental considerations, which was emphasized by the Ninth Circuit, has subsequently been underscored by the passage of the Noise Control Act of 1972. Under the new Act the Administrator of the FAA is vested with the final authority to prescribe regulations for the control and abatement of aircraft noise [§ 611(b)]. And he is to issue such regulations after considering the recommendations of the Environmental Protection Agency [§ 611(b),(c)(1)]. This regulatory process has

as its statutory goal the protection of the "public health and welfare [§ 611(b)(1), (c)(1)]. As noted by the Ninth Circuit, the delicate balance achieved by the FAA "under the aegis of federal law" should not and must not be upset by local regulation which is overprotective of one of the multiple values balanced in the national interest (A. 419).

There is no merit to Burbank's contention (Br. pp. 71-73) that federal preemption of aircraft noise regulation somehow requires a reversal of this Court's opinion in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). The *Griggs* case held that because the airport proprietor determines the location of the airport and its runways, it is liable if flights to or from the airport are found to constitute a "taking" under the Fifth and Fourteenth Amendments.* However, Burbank could not incur the kind of liability imposed in *Griggs* because it is not the airport operator. In any event, the *Griggs* case involved totally different issues than the invalidation of Burbank's attempt to use its police power to regulate aircraft operations and aircraft noise.

Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963), cited by Burbank (Br. pp. 44, 82), is also inapplicable. There the Court held that the Federal Aviation Act does not express an intention to preempt state anti-discrimination legislation. The Court, assuming that the Civil Aeronautics Board had power to bar racial discrimination with respect to customers and employees, found that the enforcement of a Colorado statute to bar racial discrimination in hiring

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* Burbank also concedes (Br. p. 73), as it must, that no Fifth Amendment "taking" is presented by this case. *See* A. 41, 55. Nor are the Ninth and Tenth Amendments, which Burbank would belatedly invoke, involved. *Id.; see* Virginians for Dulles v. Volpe, 344 F. Supp. 573, 578-79 (E.D. Va. 1972), *appeal pending*.

by air carriers did not frustrate the purpose of the federal legislation "at least so long as any power the Civil Aeronautics Board may have remains 'dormant and unexercised.' . . ." 372 U.S. at 724 (footnote omitted). The Court noted that a different situation would be presented "if the federal authorities seek to deal with discrimination in hiring practices and their power to do so is upheld." *Id.* at 724 n.22. In the instant case the FAA clearly has the power to act in the area in question, and has done so through its regulation of airspace management and aircraft noise, as summarized at pp. 10-14, 33-37, *supra.*

Equally inapposite are cases such as *Braniff Airways v. Nebraska State Board,* 347 U.S. 590 (1954) (cited by Burbank at Br. pp. 33-34), where the Court found that state power to tax aircraft had not been preempted by the predecessor of the Federal Aviation Act of 1958. The court below did not find that the federal government has preempted every conceivable aspect of aviation. The preemption in question relates to the management of airspace and the regulation of aircraft operations and aircraft noise. It is the attempted invasion of those specific areas which invalidated the Burbank ordinance.*

Head v. New Mexico Board, 374 U.S. 424 (1963) (cited by Burbank at Br. pp. 35-36), simply held that the nature of the regulatory power given the FCC was not sufficient to indicate a congressional intention to preempt all the detailed state regulation of professional advertising prac-

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* Similarly, the preemption holding of the court below is not inconsistent with this Court's ruling in Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972), that the federal statutes do not evidence a congressional purpose to preempt state power to levy charges designed to help defray the costs of airport construction and maintenance. *Id.* at 721. The preemption here relied upon does not extend to that revenue raising area.

tices, "particularly when the grant of power to the Commission was accompanied by no substantive standard other than the 'public interest, convenience, and necessity.'" 374 U.S. at 431. That case is not analogous to the present situation where the FAA, guided by carefully articulated statutory standards, has adopted comprehensive regulations governing aircraft operations, the use of the navigable airspace and aircraft noise.

Rice v. Chicago Board of Trade, 331 U.S. 247 (1947) (cited by Burbank at Br. pp. 48-49), was a companion case to *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, which was relied upon by the court below as setting forth the standards by which preemption is to be determined. *Board of Trade* considered the preemption aspects of a different statute, and the Court merely determined that the Commodity Exchange Act, unlike the United States Warehouse Act considered in *Santa Fe Elevator*, did not evidence a congressional intent to make its regulatory features exclusive in the area. This decision is completely in accord with the ruling below.

II. THE BURBANK CURFEW ORDINANCE IS IN CONFLICT WITH FEDERAL LAW.

Even absent federal preemption of an area, a local ordinance which has the effect of bringing local and federal policies directly into conflict must bow to the supremacy of national enactments. *See, e.g., Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230-31 (1964). The test for the existence of such a "conflict" was stated in *Perez* as follows:

> "Three decades ago MR. JUSTICE BLACK, after reviewing the precedents, wrote in a similar vein that, while '[t]his Court, in considering the validity of

state laws in the light of treaties or federal laws touching the same subject, ha[d] made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference[,] . . . [i]n the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." 402 U.S. at 649.

As we shall show, the Burbank ordinance stands as an obstacle to the accomplishment of the full purposes and objectives of Congress in several respects.

A. The Curfew Ordinance Conflicts With the FAA Nighttime Noise Abatement Order.

Prior to enactment of the Burbank curfew ordinance, the FAA took in hand the subject of nighttime takeoffs at Hollywood-Burbank Airport and acted to minimize the consequences of those operations by issuing the noise abatement order summarized in Finding 56 (A. 392). This order (BUR 7100.5B), which was issued by the FAA Chief of the Burbank Air Traffic Control Tower, establishes a preferential runway for departures of jet aircraft between the hours of 11:00 p.m. and 7:00 a.m. In issuing this order the responsible federal official announced his determination that the noise abatement procedures which it established were "designed to reduce community exposure to noise to the lowest practicable minimum" (PX 30, A. 454).

The court of appeals held that the Burbank ordinance is invalid because of the "conflict" between the ordinance and the FAA's order:

> "This assertion represents a considered determination by an authorized representative of the FAA that measures of the magnitude of that taken by the City of Burbank are beneath 'the lowest practicable minimum.' The municipal curfew ordinance, therefore, interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress. . . ." (A. 426-27). (Footnote omitted.)

Burbank has attempted to minimize the importance of this conflict by referring to the FAA's order as "non-mandatory" (Br. pp. 51, 52). The record is to the contrary. Based upon testimony of the Burbank Airport Tower Chief,* the trial judge found that in accordance with this order, "the preferential runway is assigned by the FAA control tower [between 11:00 p.m. and 7:00 a.m.] by incorporation into an aircraft's departure clearance as an instruction to the pilot" (F.F. 56, A. 393). And any person violating an air traffic control clearance or instruction is subject to a civil penalty and to suspension or revocation of his airman's certificate. *See* 49 U.S.C. §§ 1429, 1430(a)(5), 1471; 14 C.F.R. § 91.75. The testimony showed that the preferential runway established by the order was used except for a "few occasions" when the control tower permitted deviation because of unusual weather or operating conditions affecting safety. A. 318, 322-23.

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* Burbank's effort to diminish the order by labelling the Tower Chief as "a minor FAA official" (Br. p.18) is answered by the Ninth Circuit's observation:

> "No question is raised as to the authority of the Chief of the Tower to issue this order, nor is there doubt as to its official character." (A. 426.)

Burbank also tries to discount the FAA's nighttime noise abatement order at Burbank by contending (Br. pp. 41-43) that the *Dreifus* opinion indicated FAA approval of the curfew technique. As pointed out above, the *Dreifus* opinion related to the possible imposition of a curfew by an airport proprietor at a general aviation airport with no federally certificated, scheduled air carrier operations. The most recent expression of the FAA on this subject is contained in its *amicus* brief in the court of appeals, where the FAA states (p. 25) that in *Dreifus* it "did not endorse the Santa Monica type curfew ordinance or intend by its action to encourage a multiplication of such restrictions on airport use by state and local governments, whether or not they acted as proprietors."

Nothing suggested by Burbank can gainsay the fact that the ordinance would make the FAA order a nullity and go beyond the noise abatement measures determined by the FAA to constitute "the lowest practicable minimum." In doing so, the ordinance "interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress" (A. 426-27).*

* The State of California as *amicus* seeks to uphold the Burbank ordinance by making the unsupported assertion that the curfew serves to implement national environmental policy (Br. p. 17). However, the trial court found on the basis of uncontradicted evidence that curfew ordinances would actually aggravate, not relieve, the noise problem by causing a bunching of flights in the hours immediately preceding the curfew — the period of greatest annoyance to surrounding communities. This result, said the court, "is totally inconsistent with the objectives of the federal statutory and regulatory scheme" (F.F. 78, A. 399). Moreover, as the court of appeals held, the general commitment of environmental problems to local regulation under section 202(b) of the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371(b), does not "overcome the preemptive nature of Congress' particular commitment of air commerce problems to the federal domain" (A. 424).

B. The Curfew Ordinance Interferes With the Use of Navigable Airspace.

The court of appeals recognized a second ground of conflict between the Burbank curfew and federal law. Under the Federal Aviation Act, the United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." 49 U.S.C. § 1508(a). The Act declares that "there is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. § 1304. The circuit court held that "the effect of the curfew was to terminate the right of flight of prospective passengers" through a portion of the airspace for one-third of the hours of every day (A. 427 n.12).* This holding is clearly in accord with this Court's recognition that such local prohibition of a federally guaranteed right must fall before the Supremacy Clause. *Sperry v. Florida ex. rel. Florida Bar*, 373 U.S. 379, 385 (1963).

It provides no answer to this conflict point for Burbank to argue that only 80 passengers were boarding the flight terminated by the curfew. If local power to enforce such an ordinance were upheld, Burbank could increase dramatically the number of passengers affected by simply extending the period of its curfew.

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* Burbank attempts to refute this conflict point with unproven assertions regarding "severe noise pollution" (Br. pp. 58-59). Not only is there no evidence in the record to support these claims, but Burbank explicitly represented to the trial judge that "the noise created by these airport pure jet operations [is] irrelevant and immaterial." R. Tr. 434, 436. Burbank made no attempt at trial to introduce the hearsay noise study it would now rely upon (Br. p. 59 n.87). Since Burbank had tentatively designated this report as one of its exhibits (R. 68) and the author as one of its witnesses (R. 69), it is apparent that Burbank deliberately chose not to test this evidence before the trier of fact.

C. The Curfew Ordinance Restricts Federally Certificated Rights.

The district court found and concluded that the Burbank ordinance conflicts with the federally certificated rights and obligations of air carriers and is therefore void under the Supremacy Clause (F.F. 82, A. 400; C.L. 17, A. 404). This holding is spelled out in Conclusion of Law 17:

> "Each federally certificated air carrier is authorized and obligated by statute and by its Certificate of Public Convenience and Necessity to provide adequate service over its specified routes. Certificates of Public Convenience and Necessity held by the interstate air carriers cannot be revoked unless the carrier fails to comply with an order of the CAB requiring obedience to a federal rule found to have been violated. [49 U.S.C. § 1371(g)] The Burbank curfew ordinance, by imposing a local veto for a period of hours over use of the navigable airspace, constitutes a restriction on carriers in fulfilling their statutory duty and is tantamount to a partial suspension of the Certificates of Public Convenience and Necessity issued to interstate air carriers operating out of Hollywood-Burbank Airport. Said ordinance is therefore in direct conflict with federal law and is void under the Supremacy Clause (Art. VI, Para. 2) of the United States Constitution." (A. 404-05.)

The testimony and conclusion that the Burbank ordinance constitutes a restriction on federally conferred rights brings this case squarely with *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). There the Court held that where an interstate motor carrier holds a Certificate of Convenience and Necessity issued by the

Interstate Commerce Commission under the Federal Motor Carrier Act, the federal Supremacy Clause prevents a state from suspending the carrier's right to use the state's highways in its interstate operations as punishment for repeated violations of state highway regulations. In the present case, it is equally clear that the Burbank ban on jet takeoffs is a restriction on the interstate air carriers which operate at Hollywood-Burbank Airport and is tantamount to a partial suspension of their Certificates of Public Convenience and Necessity.

Burbank attempts to minimize this conflict by asserting (Br. p. 53) that certificates of public convenience and necessity issued to air carriers under 49 U.S.C. § 1371 merely authorize the carrier to engage in air transportation. But it is precisely this federal authorization that Burbank seeks to negate by local ordinance. Moreover, the carriers are required by their certificates to provide "adequate service," 49 U.S.C. § 1374(a), which early in the jet age was held to require service by jet aircraft. *See Fort Worth Investigation*, 31 CAB Rep. 803 (1960).

Burbank also argues (Br. p. 54) that "local *airport* authorities" must be persuaded to accept the service authorized by the CAB. But Burbank is not the local airport authority. That position belongs to the appellee Lockheed. Moreover, Burbank had an opportunity to advise the CAB of its views at the time additional service at Hollywood-Burbank Airport was being considered. And Burbank advised the Board as follows:

> "What we are interested in is gaining service at Hollywood-Burbank Airport for the citizens of the City of Burbank and the more than two and one-

half million residents of Los Angeles County who find Hollywood-Burbank Airport more conveniently accessible than the over-crowded facilities at the Los Angeles International Airport. We therefore urge that the applications of any carrier or carriers who are ready, willing and able to provide service at Hollywood-Burbank Airport to and from points in the Pacific Northwest and in particular, Portland, Oregon and Seattle, Washington, be heard and considered." (PX 36, A. 476-77.)

The Board has issued its certificate of public convenience and necessity authorizing the service requested by Burbank. The local ordinance which would restrict this federally certificated right must fall before the Supremacy Clause.

III. THE BURBANK CURFEW ORDINANCE VIOLATES THE COMMERCE CLAUSE.

The Commerce Clause, Article I, section 8, clause 3, confers upon Congress the power to regulate interstate and foreign commerce. We have summarized above the comprehensive legislation, enacted pursuant to this power, to deal with airspace management, aircraft operations and aircraft noise abatement. Even without such congressional action, however, the Commerce Clause protects the national commerce from hostile actions of state or local governments. And it has been so held for over a century. *See Southern Pacific Company v. Arizona*, 325 U.S. 761, 769 (1945); *Morgan v. Virginia*, 328 U.S. 373, 378-79 (1946).

The Court in *Southern Pacific* restated the settled tests for determining whether a local regulation is invalidated by the Commerce Clause.

> "[E]ver since *Gibbons v. Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." 325 U.S. at 767 (footnote omitted).

When a local law is challenged as invalid under the Commerce Clause, it is the responsibility of the court to weigh competing national and local interests to determine whether the local law substantially (1) impedes the free flow of commerce or (2) operates in an area where regulation should be prescribed by a single authority. *See, e.g., Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768-69 (1945), and cases cited.* In making both these determinations, the Court should not regard the local regulation as an isolated phenomenon but should consider the effect if similar regulations were enacted throughout the United States. Consideration of the national effect is especially important where a local regulation might impose inconsistent requirements upon interstate carriers so as to interfere with the efficient use of the channels of commerce. *See, e.g., Bibb v. Navajo Freight Lines*, 359 U.S. 520, 526-27 (1959); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945).

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* Burbank's reliance upon *Barnwell* (Br. p. 65) for the proposition that only Congress can determine whether a phase of commerce requires regulation by a single authority is refuted elsewhere in that very case. See South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 184-86 (1938). There the Court recognized that absent any congressional action, the Commerce Clause of its own force will void local regulation hostile to interstate commerce.

If it appears that a local law is violative of the Commerce Clause, the fact that it was passed in the exercise of the police power will not save it.

> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.'" *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 779-80 (1945).

The district court, applying the above standards, found the Burbank curfew to run afoul of the Commerce Clause (C.L. 19-21, A. 405-06).* The trial judge's conclusions are clearly correct and are supported by uncontradicted evidence, as the following will demonstrate.

A. The District Court Properly Found That a Single Authority Is Required for Airspace Management and Regulation of Aircraft Operations and Aircraft Noise.

Whether a local law, in the words of one of the *Southern Pacific* tests, regulates one of "those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority" is a determination that requires evaluation of the nature of the phase of commerce involved and the practical effect of the challenged regulation. Only in this way can a court appraise whether the subject area is one where uniformity of regulation is

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* As previously indicated, the court of appeals ruled that the Supremacy Clause issues were dispositive and limited its opinion to those issues (A. 414). The district court held the Burbank curfew ordinance invalid under both the Supremacy and Commerce Clauses.

necessary to assure the efficient and free flow of national commerce. *Kelly v. Washington*, 302 U.S. 1, 9 (1937).

After considering the evidence before him, the district court ruled in its memorandum opinion as follows:

> "There is no conflict in the evidence adduced in this case and it should be concluded that air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at maximum safety and efficient use of the navigable airspace.
>
> "The evidence discloses that air traffic is unique and should be controlled on the national level." (A. 368.)

The court reiterated this view in Conclusion of Law 21:

> "The volume of air commerce, the speed with which it is conducted, the technical complexity of its scheduling and operation, and the limited availability of such of its essential aspects as airports, aircraft, air traffic routes, and aircraft maintenance facilities all make national uniformity of regulations prescribed by a single authority a necessity, so that this phase of the national commerce may be conducted with maximum safety and so as to achieve efficient use of the navigable airspace." (A. 406.)

The national character of air transportation which demands regulation by a single authority is vividly demonstrated by the centralized flow control system and high density traffic airport rules established by the FAA. *See* F.F. 48-54, A. 390-92. The trial court also considered evidence of the complexity of national aircraft flight operations (F.F. 41-47, A. 386-89) as well as testimony regarding the intricate and complex problems of schedul-

ing and maintenance of air carrier aircraft (F.F. 75-76, A. 398).

The need for centralized management of the navigable airspace is also shown by considering the confusing, even chaotic, effect of permitting regulation by the conflicting political jurisdictions that surround and interact upon many major airports in the United States. The testimony of the former head of the Civil Aeronautics Administration depicted a number of these potentially hazardous situations (A. 292-93). Another instance of conflicting local regulation which interrupted airport operations was dealt with by the Second Circuit in *United States v. City of New Haven*, 447 F.2d 972 (2d Cir. 1971). And in this case the evidence shows that a portion of the Hollywood-Burbank Airport lies within the cities of Los Angeles and Burbank and portions of its runways are owned by the federal government (F.F. 6, A. 377).

Indeed, the need for centralized regulation is highlighted by the geographical area served by the Hollywood-Burbank Airport: the majority of passengers desiring to depart from the Airport within curfew hours are probably not Burbank residents. Such "extraterritorial effects" of state and local statutes have always played an influential role in persuading this Court to invalidate local regulations. *See Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-68 n.2 (1945); *Edwards v. California*, 314 U.S. 160, 174 (1941).

Other decisions recognizing that regulation of air transportation must come from a single source if the flow of commerce is not to be impaired are *American Airlines, Inc. v. City of Audubon Park*, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969); *American Airlines, Inc. v. Town of*

Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd* without reaching commerce clause issue, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); and *All American Airways, Inc. v. Village of Cedarhurst*, 106 F. Supp. 521 (E.D.N.Y. 1952), *aff'd*, 201 F.2d 273 (2d Cir. 1953).

In sum, the Burbank curfew ordinance, particularly when viewed in the light of its natural tendency to induce a proliferation of similar restrictions, surely operates in one of those areas which "demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945). Local attempts to restrict airports so integrally connected with interstate commerce for one-third of the available hours every day would hobble the nation's airport and airway system. Such a result would be especially undesirable because the system, to borrow from the Congressional declaration of policy in the Airport and Airway Development Act of 1970, 49 U.S.C. § 1701, already "is inadequate to meet the current and projected growth in aviation" and requires "substantial expansion and improvement... to meet the demands of interstate commerce . . . ."

B. The District Court Properly Found the Burbank Ordinance To Impede Substantially the Free Flow of Interstate Commerce.

The district court also evaluated the Burbank curfew under the other *Southern Pacific* test: whether the regulation impedes substantially the free flow of interstate commerce. The court concluded that:

> "The nationwide imposition of ordinances such as Burbank's would seriously interrupt the carriage of interstate passengers, mail, and goods and thereby

substantially impede the free flow of commerce from state to state, and, considered on such a national basis, such ordinances could not stand." (C.L. 20, A. 405.)

The trial court was entirely correct in holding that under the Commerce Clause, an ordinance such as Burbank's cannot be considered "solely in the accident of its particular circumstances but must be weighed and tested as if imposed on a nation-wide basis" (C.L. 13, A. 404). *See, e.g., Hood & Sons v. DuMond*, 336 U.S. 525, 538-39 (1949); *Mississippi Railroad Comm'n v. Illinois Central R.R.*, 203 U.S. 335 (1906); *Minnesota v. Barber*, 136 U.S., 313, 321 (1890), and cases cited *supra* page 72. The same approach was taken by the district court in *American Airlines, Inc. v. Town of Hempstead*, 297 F. Supp. 226, 231 (E.D.N.Y. 1967), *aff'd on other grounds*, 398 F.2d 369 (2d. Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969), in considering the constitutionality of a local law regulating the flight of aircraft.*

Findings of Fact 67 through 82 detail the "near catastrophic effect" that ordinances such as Burbank's would impose on interstate commerce (F.F. 70, A. 396). For example, scheduling would be drastically upset, with the departures of flights between widely separated cities limited in some cases to less than one-third of the available hours of the day (F.F. 68, A. 396). Continental Air Lines alone would have to cancel over 48 flights per day (F.F. 71, A. 397), and its operating costs would be increased by approximately 25 percent (F.F. 72, A. 397). Other carriers would be similarly affected (F.F. 73, A. 397).

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* In addition, testing the ordinance as if imposed on a national basis was warranted by the uncontradicted testimony, A. 276, 284-85, that these ordinances, if upheld, would proliferate and be adopted by virtually all cities surrounding airports. *See* F.F. 69, A. 396.

Each day, some 1,009 scheduled departures occur throughout the country between 11:00 p.m. and 7:00 a.m., and all of these flights would have to be cancelled (F.F. 74, A. 397). Because over 48 percent of the nation's air mail is carried during curfew hours, billions of pieces of mail annually would be delayed at least one day in delivery (F.F. 79, A. 399). The air cargo industry exists upon its ability to operate during curfew hours, and the required cancellation of these all-cargo services would have a drastic impact upon the nation's business community (F.F. 80-81, A. 399-400).

In sum, the findings show that the imposition of curfew ordinances on a nationwide basis would (1) drastically restrict the hours available for flight scheduling far beyond the curfew period, (2) severely impair the efficiency of the maintenance system, (3) require extensive rescheduling at enormous inconvenience and expense, (4) deteriorate air transportation service to the public, (5) increase the already serious congestion problem, (6) intensify the noise problem in the hours immediately preceding the curfew, which is the period of greatest annoyance to surrounding communities, and (7) delay billions of pieces of mail and air freight annually with resulting drastic effect upon the business community. (F.F. 67-68, 70-82, A. 396-400.)

These massive disruptions in the national air transport system clearly constitute an unreasonable burden on interstate commerce and impede substantially its free flow. The effects of curfew laws would be far more destructive of the free flow of commerce than those which have caused the Supreme Court to strike down earlier local regulatory enactments. *See, e.g., Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (regulating the length of railroad trains passing through the state); *Railroad*

Company v. Husen, 95 U.S. 465 (1877) (prohibiting the conveyance of specified types of cattle into the state between March and November of each year); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (prescribing specialized equipment on trucks passing through the state).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Noise Control Act of 1972

Public Law 92-574, 86 Stat. 1234
92nd Congress, H. R. 11021
October 27, 1972

AIRCRAFT NOISE STANDARDS

SEC. 7. (a) The Administrator, after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after the date of the enactment of this Act.

(b) Section 611 of the Federal Aviation Act of 1958 (49 U.S.C. 1431) is amended to read as follows:

"CONTROL AND ABATEMENT OF AIRCRAFT NOISE AND SONIC BOOM

"SEC. 611. (a) For purposes of this section:

"(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

"(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

"(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

"(2) The FAA shall not issue an original type certificate under section 603(a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d).

"(c)(1) Not earlier than the date of submission of the report required by section 7(a) of the Noise Control Act of 1972, EPA shall submit to the FAA proposed regula-

tions to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within a reasonable time after the conclusion of such hearing and after consultation with EPA, the FAA shall—

"(A) in accordance with subsection (b), prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

"(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations.

"(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1)(A)(ii) or (1)(B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of pre-

scribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

"(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 102(2)(C), the report of the FAA indicates that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

"(d) In prescribing and amending standards and regulations under this section, the FAA shall —

"(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

"(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

"(e) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 609, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the FAA if it finds that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation."

(c) All—

(1) standards, rules, and regulations prescribed under section 611 of the Federal Aviation Act of 1958, and

(2) exemptions, granted under any provision of the Federal Aviation Act of 1958, with respect to such standards, rules, and regulations,

which are in effect on the date of the enactment of this Act, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Administrator of the Federal Aviation Administration in the exercise of any authority vested in him, by a court of competent jurisdiction, or by operation of law.